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No. 97-569

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

JONATHAN P. HIATT
815 - 16th Street, NW
Washington, DC 20006

MARSHA S. BERZON
177 Post Street
Suite 300
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, DC 20036
(202) 833-9340

* Counsel of Record

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Question Presented in this case is whether a claim of *quid pro quo* sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, is made out where a supervisor threatens a subordinate employee that she will suffer adverse employment consequences if she does not submit to sexual advances, but does not carry out those threats (either because she submits, because she sues before the threat can be carried out, or because he was bluffing). The legal significance of this question to this case is far from clear.

Two kinds of Title VII cases that differ in their focus and patterns of proof have come to called sexual harassment cases. The first, the *"quid pro quo"* category, is essentially a variety of individual Title VII disparate treatment cases, such as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny, in which the plaintiff challenges a discrete adverse employment decision on the ground that the decisionmaker was motivated, at least in part, by sex, race, or other criteria impermissible under Title VII. The second, the "hostile environment" category, centers on the imposition of discriminatory working conditions and requirements.

The standard covering the latter category of cases, established by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), recognizes, that discriminatory behavior need not always be repetitive in order to create a working environment that impermissibly discriminates on the basis of sex. In particular, where a woman capitulates to her supervisor's sexual demands to avoid threatened job consequences, the requirement that she perform sexual services to maintain her employment status is almost surely a discriminatory working condition, without more. And, where a supervisor threatens such job consequences if the employee does not capitulate but has not yet carried out the threat, the impending threat is, as the

District Court found in this case, likely to pervade the woman's working environment whether repeated or not.

That the *quid pro quo*/hostile environment categorization is helpful in isolating the elements of proof of two kinds of Title VII cases does not mean, however, that this pigeonholding is helpful for any other purpose. In particular, while the lower courts in this case *presumed* that this bifurcation also governs the question whether an employer is liable for illegal sexual harassment by a supervisor, there is *no* reason that should be so.

Rather, as in Title VII law generally, the employer vicarious liability question in sexual harassment cases should turn on the nature of the authority vested in the supervisor and the connection between that authority and the illegal harassment. That the harassment itself is not motivated by an intention to forward the employer's interests is of no more relevance for sexual harassment cases than it is where the actionable motivation is the personal racism or misogyny of a supervisor with authority to control a given aspect of the supervised employees' worklives that results in the supervisor's discriminatory treatment of those employees.

Because the respondent in this case made out a sufficient hostile environment case, relying in part on threats made by a supervisor acting from discriminatory motives and with authority to carry out those threats, and in part on discriminatory harassing conduct by that same supervisor while carrying out his supervisory authority, the question whether she also made out a *quid pro case* sexual harassment case is irrelevant.

Although the foregoing analysis is sufficient to decide this case, we also address briefly Judge Posner's alternative "company act" analysis in his opinion in the *en banc* proceedings in this case. As we show, that analysis is inconsistent with *Meritor* in that it entirely ignores even the broadest outlines of traditional agency law; is based on the premise that federal sexual harassment law is solely concerned with detering harassment and not at all with

providing compensation to harassment victims, an assumption that cannot be squared with either Title VII law generally or the specific purposes of the 1991 Congress in adding a compensatory damages remedy; and, by substituting a negligence standard for an agency standard in supervisor sexual harassment cases, will involve the courts unnecessarily, and without any legislative standards, in the details of sound management practices.

ARGUMENT

I. THE LEGAL SIGNIFICANCE OF THE QUESTION PRESENTED.

1. Petitioner Burlington Industries, Inc. asks this Court to decide whether on the facts of this Title VII case—in which a male Burlington manager made a female employee's acquiescence in his sexual advances a condition of her job performance—a claim of "*quid pro quo* sexual harassment" is, or is not, made out.

Petitioner is, of course, master of its own Question Presented. But, at the same time, it is fair and proper—and in this instance we believe highly productive—to begin answering that question by inquiring into its legal significance.

The term "*quid pro quo* sexual harassment," after all does not appear in Title VII. One therefore cannot divine from the statute itself what an affirmative or negative answer to the question Petitioner presents entails in legal consequences, nor does the statute provide any textual clues as to the correct answer.

To be sure, as we show below, asking and answering the question Petitioner presents *may* well be a convenient way to categorize at the most general level the standards governing, and the modes of proving, whether the plaintiff has been subjected to discriminatory working conditions under Title VII where a particular recurrent fact pattern is present.

But it is our position that asking and answering the *quid pro quo* question Petitioner poses serves no other

useful role in applying Title VII. Rather, we submit, the principles for determining, in any particular case, whether or not an employing entity is liable to the plaintiff for discrimination on the basis of gender of the kind that has come to be called sexual harassment is in the end conceptually distinct from the principles used to distinguish the substantive class of cases usually called *quid pro quo* sexual harassment cases from other sexual harassment cases.[2]

2. It is useful to begin recounting the various roles the concept of *quid pro quo* sexual harassment has taken on as this case has developed. Doing so goes a long way toward isolating the relevance of the categorization question Petitioner asks this Court to answer as if that question is the dispositive legal question in this case.

(a) The plaintiff in this case, Kimberly B. Ellerth, filed a Title VII complaint alleging generally that she was "inappropriately touched and sexually harassed in her place of employment." Pet. App. 219a. When the defendant, Burlington Industries, Inc., moved for summary judgment, Ellerth presented deposition testimony and declarations setting forth (1) that Ted Slowik, the vice president of sales and marketing of the Burlington division in which Ellerth was employed, repeatedly, during the fourteen months Ellerth was employed by Burlington, made her the object of sexually-charged remarks and subjected her to sexual innuendo; touched her inappropriately; and objected that she was "arrogant" and not "loose" enough;

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[2] The American Federation of Labor and Congress of Industrial Organizations filed an *Amicus Curiae* Brief in Support of Petitioner ("Amicus Br.) in *Faragher v. City of Boca Raton*, No. 97-282. *Faragher*, on our view of the properly applicable employer liability principles, is closely analogous to this case on that issue. Rather than repeating the analysis set out in that brief a second time, throughout this AFL-CIO *amicus* brief we summarize the pertinent points made there, refer the Court to the appropriate pages of our *Faragher* brief for further elucidation, and then provide whatever additional explanation is occasioned by the particular facts of this case or by the briefs filed by Petitioner and its *amici* in this case.

and (2) that Slowik admitted that he had considered refusing Ellerth a promotion because she was not "loose" enough, and at least three other times indicated that unless Ellerth met his sexual specifications her employment situation at Burlington would suffer. In the latter regard, on two occasions, just before Ellerth resigned, Slowik refused to approve the creation of specific fabric samples she needed to serve a customer because Ellerth would not gratify his sexual interest by wearing shorter skirts, and did so at a time when Ellerth was being criticized for not providing prompt, satisfactory customer service, a criticism that contributed to her resignation decision. Jt. App. 10-14, 81-85, 88-99.

The District Court viewed this evidence as sufficient, if believed by the jury, to demonstrate that Slowik's conduct was both "discriminatory" and "severe and pervasive enough to alter the conditions of Ellerth's employment," applying the "hostile environment" standard for determining Title VII discrimination based on sex set out by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) and reiterated both in *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993) and, earlier this month, in *Oncale v. Sundowner Offshore Services*, —— U.S. ——, 118 S. Ct. 998 (March 4, 1998).

In so holding, the District Court stressed in its factual analysis that Slowik's express "threats" to visit adverse employment consequences on Ellerth for non-acquiescence bolstered her claim that his behavior was "severe" enough to create discriminatory working conditions. Pet. App. 266a; *see also* Pet. App. 280a ("the hostile work environment to which Ellerth was subjected was created and maintained, in part, by Slowik's *quid pro quo* insinuations"); Pet. App. 264a ("It is very important to recognize . . . that embedded in Slowik's harassment of Ellerth is a *quid pro quo* proposition . . . which the jury could reasonably find pervaded her employment at Burlington. It would not be hard to conclude that every effort toward

achievement that Ellerth made at Burlington was tainted by Slowik's threat.")

The District Court then went on to address the categorization question that has become talismanic in Title VII sexual harassment law and that forms the core of the question Petitioner presents to this Court for decision: The District Court maintained that "We do not mean to suggest that Ellerth has advanced a claim of *quid pro quo* harassment." Pet. App. 264a, n.10. "She has not," said the District Court, because Ellerth did not claim that Slowik had "actually withheld tangible employment benefits as a result of her failure to submit to his sexual overtures." *Id.*[3]

(b) The District Court's approach is both sensible and consistent with this Court's precedents so long as it is taken as a description of two different recurrent proof patterns demonstrating actionable disparate treatment based on sex. The first rests on a showing that a particular advense employment action by a supervisor was impermissibly motivated by a subordinate's response to discriminatory sexual demands. The second rests on a showing that a supervisor, by his manner of carrying out some aspect of his supervisory authority, has "created an abusive working environment" that is "permeated with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Systems, supra,* 510 U.S. at 21.

The first type of claim—denominated by the District Court as "*quid pro quo*" harassment, following the common usage in recent judicial opinions—is essentially indistinguishable, both conceptually and as to manner or mode of proof, from other Title VII disparate treatment

[3] We note that this carefully worded statement covers over the facts that, on the evidence, a jury might properly have concluded (1) that while Slowik did not discriminatorily "withhold" a benefit, he did discriminatorily delay one (Ellerth's promotion); and (2) that Slowik did in fact make discriminatory job-related decisions not to approve the production of a sample that Ellerth needed for a customer.

challenges to specific, individual employment decisions adversely affecting a plaintiff. In enacting Title VII "Congress . . . forbid employers to take gender into account in making employment decisions," including "the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion); *see also id.*, at 265 (O'Connor, J., concurring) ("Congress considered reliance on gender or race in making employment decisions an evil in itself."). Because "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice" regarding employment decisions generally (*id.* at 239 (plurality opinion) *quoted in McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361 (1994)), disparate treatment Title VII cases of this kind center upon determination of the decisionmaker's "mental processes" (*United Postal Service Bd. of Governors v. Aikens*, 460 U.S. 411, 416 (1983)), and upon the link between those mental processes and the final decision (*see Price Waterhouse v. Hopkins, supra*). And, because employer decisionmakers are unlikely to announce the discriminatory basis for their decisions, such cases usually require the drawing of inferences from circumstantial evidence regarding the factors motivating the decision. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Where a plaintiff contends that an employment decision was influenced by the fact that she rejected the sexual advances of an employer decisionmaker, her case challenges that decision as one that impermissibly "[took] gender into account in making employment decisions." *Price Waterhouse v. Hopkins, supra*, 490 U.S. at 239 (plurality opinion): Had she not been a woman, the decisionmaker would not have conditioned her employment security upon engaging in sexual behavior, and would not have penalized her for refusing to do so. The proof differs from non-sexual harassment individual disparate treatment

cases only in that the plaintiff in a *quid pro quo* sexual harassment case would ordinarily have to prove in some manner the sexual proposition and rejection. Aside from that, such cases are identical to other Title VII cases challenging discrete decisions concerning employment matters on the basis that the decisionmaking process was infected by impermissible gender considerations.[4]

The second kind of sex harassment pattern of proof—denominated a "hostile environment" claim in recent common judicial parlance—focusses not on a discrete hiring, promotion, discharge or other similar employment decision but on the imposition of discriminatory working conditions and requirements. "The very fact that discriminatory conduct [is] so severe *or* pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality." *Harris v. Forklift Systems, supra,* 510 U.S. at 22 (1993) (emphasis supplied). This very general standard, which applies whenever the claim is that the employee is being subjected to a discriminatorily abusive working environment, can be met by a wide range of abusive discriminatory conduct. The single constant is that the plaintiff must show that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sudowner Offshore Services, Inc., supra,* 118 S. Ct. at 1002. As this Court emphasized in *Oncale,* that showing can be made through various "evidentiary route[s]," as long as "the plaintiff . . . prove[s] that the conduct at issue was

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[4] As this case suggests, a sexual advance need not be a request for sexual intercourse; supervisors may demand less intrusive forms of sexual accommodation or titillation and still penalize a woman for non-compliance. At some point then, the distinction between sexual harassment of this kind and impermissible sexual stereotyping of the kind at issue in *Price Waterhouse—viz.*, the requirement that women employees exhibit stereotypically "femine" behaviors in the workplace—merge. *See* AFL-CIO *Faragher v. Boca Raton Amicus* Br. at pp. 5-7.

not merely tinged with offensive sexual conduct, but actually constituted "*discrimina*[*tion*] . . . because of . . . sex." *Id.* (emphasis in original).

While the factual circumstances that meet this very general standard vary widely, we would expect that over time some rules of thumb will develop regarding certain frequently recurrent courses of conduct, establishing that such courses of conduct are both discriminatory on the basis of sex and severe or pervasive enough to create abusive working conditions. Indeed, the current case suggests two such categories:

First, where there is an explicit, unwelcome, credible demand by a male supervisory or managerial representative of the employer that a female employee engage in sexual intercourse or other intimate sexual behavior or else lose concrete employment benefits, and the employee capituates rather than refusing and endangering her livelihood, the *Meritor/Harris/Oncale* standard would, it appears, be met, without more. As *Oncale* observes, in such a situation, "the inference of discrimination is easy to draw . . . , because the challenged conduct . . . involves explicit proposals of sexual activity" and "it is reasonable to assume that those proposals would not have been made to someone of the same sex." 118 S. Ct. at 1002. The requirement that women but not men must engage in sexual behavior as one of the women's job requirements in order to keep the same job and earn the same salary is certainly a seriously "disadvantageous . . . condition[] of employment". *Id.* And the invasion of privacy, imposition of intimacy, and compromise of one's own personal moral values involved in linking employment security with such sexual submission is "severe" and "abusive," whether "pervasive" or not. *Harris v. Forklift Systems, supra,* 510 U.S. at 21.

Second, as the District Court in this case recognized, where a supervisor explicitly, or by direct implication, threatens to adversely affect a subordinate's employment security, compensation, or status unless she satisfies his

sexual demands, the "discriminatory intimidation" (*Harris v. Forklift Systems, supra,* 510 U.S. at 21) created by being required to work under such a threat for any appreciable time period will often be sufficiently "severe" to "create an abusive working environment," standing alone (*id.*).[6] Whether that is so or not may turn on the credibility and specificity of the threat, the length of time the threat impends, and the nature of the sexual conduct the supervisor is demanding.

In particular, an unfulfilled threat, while pending, can be "pervasive" without being restated. Until the threat is revoked directly or by lapse of time, the employee is faced each day with the decision whether to capitulate in order to avoid a future employment-related injury at the hands of the harassing supervisor; and this is so even if the threat itself is never repeated.

Moreover, even if consistently adamant in her refusal, the employee is likely to experience the workplace as discriminatorily hostile while the threat impends: One who has been told that her efforts at her job tasks, even if exemplary, will *not* be rewarded on the same terms as those of her fellow employees is likely to experience the threat, standing alone, as "detract[ing] from [her] job performance, discourag[ing] [her] from remaining on the job, [and] keep[ing] [her] from advancing in [her] career[]" (*Harris v. Forklift Systems, supra,* 510 U.S. at 22), at least until it becomes clear, if it does, that the threat will not be carried out.

(c) The distinction between "*quid pro quo*" and "hostile environment" patterns of proof, then, is at bottom a utilitarian means of summarizing two different ways plain-

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[6] As *Oncale* points out, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." 118 S. Ct. at 1002. Where there is no inference of sexual desire, though, issues concerning discriminatory threats and possible submission are unlikely to arise. We therefore concentrate in the text on situations in which the harassment *is* based on "sexual desire."

tiffs seek to prove gender-based employment discrimination. The distinction facilitates the effort by judges and litigants to refine the general prohibitions of Title VII so that the law can be applied with greater coherence and predictability. But the cognitive advantage of this system of categorization is lost if it obscures the deeper truth that sexual harassment cases are simply one of the many kinds of individual disparate treatment gender-based discrimination cases, and that "[t]he central focus in [such a] case . . . is always whether the employer is treating 'some people less favorably than others because of their . . . sex. . . .'" *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978).

Thus, while categorization and systematization can facilitate legal decisionmaking by isolating factors likely to be determinative in cases that resemble each other, such categorization, like other aids to "evaluat[ing] the evidence . . . as it bears on the critical question of discrimination" can also become "rigid, mechanized or ritualistic," in a way that impairs rather than aids the decisionmaking process. *Furnco Construction Co. v. Waters, supra*, 438 U.S. at 577. In particular, categorization of cases according to certain criteria is of no aid in answering legal questions *different* from those that led to the categorization in the first place, and as to which it is *not* those criteria—but *others*—which are critical in the applicable legal analysis.

The District Court decision in this case is illustrative. That decision is, at points, so focused on the *quid pro quo*/hostile environment distinction that the ultimate Title VII question—whether Burlington is to be absolved of responsibility for the gender-based discrimination in working conditions created by the actions of Slowik, a vice president of one of Burlington's divisions—becomes lost. The District Court proceeded on the premise that this case—and the ultimate employer Title VII liability issue it poses—had to be fitted into a rigid bi-polar *quid pro quo*/hostile environment legal world even though its facts are at neither

pole. The truth of the matter is that Slowik's creation of discriminatory working conditions involved the kinds of threats to the plaintiff's employment security that are an integral part of cases in which a plaintiff challenges a discrete employment decision as motivated by her refusal of sexual favors. The dilemma that truth poses, as the District Court saw the matter is this:

> [T]he hostile work environment to which Ellerth was subjected was created and maintained, in part, by Slowik's *quid pro quo* insinuations. *Quid pro quo* harassment, unlike hostile environment harassment, has generally been treated as giving rise to strict liability on the part of the employer. . . . Thus, we must consider whether the strict liability standard should apply in a case such as this where there is a *quid pro quo* component to the hostile work environment. [Pet. App. 280a.]

And the District Court responded by concluding that *because* this case is fundamentally focussed on discriminatory working conditions, "[t]o apply a *quid pro quo* [strict liability standard] under these facts would amount to the tail wagging the dog." Pet. App. 284a.

By and large, the myriad opinions of the Court of Appeals judges issued on *en banc* consideration of this case similarly approach the emloyer liability issue posed here by confounding the categorization of cases according to the kinds of wrongful acts shown in making out a substantive Title VII claim with the categorization of cases according to the actor's role within the company hierarchy that goes to determining whether the company as an employer is legally responsible for the discrimination alleged and should compensate the victim for her injury. *See, e.g.*, Pet. App. 17a (Flaum, J.) ("[d]efining an actionable *quid pro quo*, of course, is central to the liability standard"); *id.* at 30a (Cudahy, J.) ("distinguish[ing] the two kinds of harassment claims makes sense" in determining employer liability issues); *id.* at 154a-155a (Marion, J.) (stressing the importance of "retain[ing] the distinction

between hostile environment and quid pro quo harassment, and . . . impos[ing] a consistent standard of liability . . . in cases of hostile environment harassment no matter whether the harasser is a supervisor or co-worker."); *compare id.* at 178a-179a (Wood, J.) (criticizing the majority for "mak[ing] the employer's liability for a supervisor's action depend on the artificial distinction between '*quid pro quo*' and 'hostile environment' harassment" because that approach "conflates two distinct inquiries, what counts as discrimination for purposes of Title VII and when must the employer answer for it . . . Nowhere does [Title VII] suggest that the question of who speaks for the employer depends on the type of discrimination . . . . at issue").

II. EMPLOYER LIABILITY IN TITLE VII SEXUAL HARASSMENT CASES.

1. Outside the sexual harassment context, employer liability in Title VII cases has always been understood as turning on the generic question whether an individual authorized to act for the employing entity is acting within the area of the authority delegated to him by the entity in carrying out the complained-of discrimination, and not on the particular kind of discriminatory action that individual engaged in.[6] That the employing entity did not sanction the particular action that violated Title VII, or did not forbid that kind of action, has never been considered relevant to employer liability under Title VII.

In this respect, Title VII law is of a piece with modern agency law generally. Thus, the fact that an employing entity does not authorize—and indeed prohibits—sexual harassment is no more relevant to its employer "vicarious liability" for sexual harassment than is the fact that modern employers generally ban other forms of illegal discrimination by their supervisors and managers is to the entity's liability for those other forms of discrimination.[7]

[6] *See* AFL-CIO *Faragher v. Boca Raton Amicus* Brief at pp. 14-15.

2. While general agency law in the past tended to hold companies liable only where a company actor was acting in part with the intention of forwarding the company's business interests, modern agency law has tended often (but not always) to view actions with a "personal element" in their motivation as attributable for liability purposes to an employing entity where the employee's "entire course

[7] There is a tendency in the Title VII case law to refer to the inquiry into which activities by its supervisors and managers an employing entity is answerable for as an inquiry into whether there is to be "strict" liability or only liability for the "employer's *own* wrong." Issues of the liability of a business company, or other organizational entity, for injury caused by the individuals the entity hired to carry out its affairs, however, are not true strict liability issues at all as defined in the tort law of, e.g., product liability.

Product liability dispenses with the need to show wrongful action either in the sense of badly motivated action or of negligent acts or omissions. That is *not* true under any theory of employing entity Title VII liability.

Employing entities in the vast majority of circumstances interact with other entities and individuals only through individuals employed, or engaged, by the entity. It makes no sense to talk as if making the entity responsible for injuries caused by action of the individuals acting for it is tantamount to holding the entity liable in damages although the entity has done nothing wrong. Rather, in a case such as this one, *someone* connected with the entity *has* intentionally acted in a discriminatory fashion made culpable by the statute—here, Slowik—and the liability question is whether that person is sufficiently connected to the entity with respect to the action he took that the entity should properly be recognized as the wrongdoer.

While somewhat metaphysical, the conceptual difference seems to us to be a critical one, which is why we use the term "vicarious liability" rather than "strict liability" throughout our argument. We do so for want of a better common term and even though "vicarious liability"—a term that comes out of the master/servant law and originally refered to a master who was a single individual not an entity that constitutes a "legal person"—also has connotations of imputing to someone responsibility for *someone else's* actions, rather than of determining who the relevant "someone" is.

of conduct was inextricably intertwined with his service to his employer." *Field v. Sanders*, 29 Cal. 2d 834, 840 (1947).[8]

Moreover, to the degree that modern agency law is not uniform in this latter regard, the fundamental purpose of Title VII, and of employment discrimination laws generally—forwarding "[t]he broad, overriding interest shared by employer, employee and consumer in efficient and trustworthy workmanship assured through fair . . . and neutral employment [practices]" (*McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 800)—commends a rule analogous to the one adopted in *Field v. Sanders* and similar cases.

Delving into the deep wellsprings of human behavior to the degree that a distinction between personally-motivated and business-motivated discrimination under

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[8] *See AFL-CIO Faragher v. Boca Raton Amicus* Brief, pp. at 19-20. In the AFL-CIO *Faragher* Brief, we gave some examples of the more modern trend in agency law regarding situations in which the injury is directly caused by personally motivated behavior but the behavior was both prevalent enough that the employer could have expected it and occurred as the employee was in the course of carrying out tasks within the scope of the employee's authority. Those examples included damage caused by smoking on the job, whether authorized or not. The smoking is obviously a purely personal pleasure. But employers do not necessarily avoid liability by fractioning off the personal behavior that directly caused the injury from the larger course of employment-related conduct in which the employee was engaged on the employing entity's behalf at the same time. And, employers are generally responsible for injuries caused by drunk employees, even where it is clear that had the employee not been drinking for his own pleasure no injury would have occurred. Similarly, cases like *Field v. Sanders*, *supra*, and *Carr v. Wm. C. Crowell Co.*, 28 Cal. 652 (1946), found employer liability for intentional torts of violence where an employee while engaged in activity on behalf of the employer became angry for reasons having no apparent connection with advancing the employer's interest and injured the plaintiff.

Title VII would demand taxes the litigation system to—and perhaps beyond—its limits. And, such a distinction would insulate from liability those discriminatory employment practices motivated by the most instinctive and irrational, and therefore least tractable, hatred and prejudice. Protecting from the reach of Title VII decisions made by hard-core misogynists (and racists), willing to compromise their employer's overall, long-term interest in attracting and retaining the best workers in order to satisfy their personal prejudices, surely does not forward the "purpose of Congress . . . to *eliminate* those discriminatory practices and devices which have fostered [sexually] stratified job environments." *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 800 (emphasis supplied).[9] This ap-

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[9] If it were relevant to employer liability under Title VII whether the supervisor's discrete injurious actions (as opposed to the broader course of conduct within which they occurred) were motivated by an intention to advance the employer's interests rather than personal interests, employer liability for the one form of sexual harassment as to which there *has* been a consensus that such liability is proper would be eliminated. For supervisors who refuse to hire, discharge, or refuse to promote employees who do not comply with their sexual demands are surely not laboring under the illusion that they are forwarding the employer's business interests rather than their own personal interests in so doing.

That this is so does not demonstrate that the consensus regarding employer liability that has developed in the classim *quid pro quo* harassment cases is mistaken. Rather, the lesson is that the "employer interest" criterion for determining whether a supervisor's actions are within the scope of his authority has *not* been applied to such cases precisely because those cases are an integral part of the larger class of Title VII disparate treatment employment decisions cases (in which, as we have seen, an employer is liable for discriminatory decisionmaking even if the decisionmaker is doing nothing more than expressing, through his actions, his purely personal prejudice and preferences).

That perceived structural identity has aided the lower courts in understanding that if Title VII's purposes are to be met, employer liability in sexual harassment cases that take the *quid pro quo* form must be imposed without regard to the probable fact that the supervisor discriminated to please himself rather than to forward the employer's interests. Against that background, it is wholly im-

proach has no more to commend it as a device to insulate employers from responsibility for the creation by a sexist supervisor of sexually discriminatory working conditions than as a device to insulate employers from liability for discriminatory refusals by a racist supervisor to hire African Americans with superior qualifications and recommendations.

3. Under the general, modern "scope of authority" approach to employer liability properly applicable under Title VII generally—and under sexual harassment law particularly—the determination whether the employing entity is liable to a plaintiff for discriminatory actions by a supervisor should turn, then, on first delineating the nature of the supervisor's authority and responsibilities on behalf of the employer, and on thereafter determining whether the supervisor's discriminatory actions involve, at least in part, the area of responsibility entrusted to the supervisor by the employing entity.

The result of applying those scope of authority standards will be that employers will generally be liable where a supervisor entrusted with making certain kinds of discrete employment decisions is influenced by a sexually-related reason in making such a decision (including the reason that the affected employee spurned sexual advances).[10] Where, however, the proof pattern concerns

proper to bring in, like a *deus ex machina*, "personal motivation" as an insuperable agency law reason for precluding vicarious employer liability in discriminatory work environment sexual harassment cases simply because those cases differ in other respects, but *not* in the nature of the supervisor's motivation, from traditional Title VII individual disparate treatment cases.

[10] This is not to say that an employer will always be responsible for injuries caused by a supervisor who retaliates against an employee for spurning sexual advances, even where those advances took place at work. A supervisor who slashes the tires on an employee's car parned on the street, or makes after-hours harassing telephone calls to the employee's home, is acting outside the authority delegated to him by the employer. Put another way, while in one

discriminatory working conditions and conforms to the hostile environment model, "employers [will not] *always* [be] automatically liable for sexual harassment by their supervisors" (*Meritor Savings Bank, supra*, 477 U.S. at 72 (emphasis supplied)), although in many situations (including this one) the employer will be.[11] In particular,

sense it is true that the narrow *quid pro quo* kind of sexual harassment case will almost always result in employer liability, that is because the category is *defined* as one in which the supervisor makes and carries out threats to use employer-delegated authority to coerce sexual compliance, whereas other categories of sexual harassment cases are not so defined.

[11] The employer and their *amici* in this case and in *Faragher* have read *Meritor* as if it stated that employers can never, or almost never, or rarely, or less than half the time, be vicariously liable for sexual harassment by supervisory personnel. In fact, as the quotation in the text indicates, the holding of *Meritor* regarding vicarious employer liability is avowedly exceedingly narrow, and, in context, served the office of ruling out the singular D.C. Circuit stnadard that had been applied in that case—a standard that went beyond modern agency law in that it made the supervisor's scope of authority irrelevant and imposed employing entity liability by reason of the supervisor's title alone. *See* 477 U.S. at 73 *rejecting Vinson v. Taylor*, 753 F.2d 141, 151 (D.C. Cir. 1985).

Under the D.C. Circuit *Meritor* standard, unwelcome sexual advances by a supervisor at a private party, and harassment by a department head of an employee not in his department and over whom he wields no employing entity conferred authority would become the basis for suits against the employer.

Similarly, such an automatic standard would assess employer liability for discriminatorily abusive working condition where the harassing behavior was perpetrated by an individual (such as Lieutenant Silverman in the *Faragher* case) who had only a minor supervisory authority as opposed to an individual (such as Chief Terry in *Faragher*) who was charged with general supervision of the workplace.

The scope of authority limitation on the liability of employing entities for acts by supervisors, which would preclude vicarious liability under such circumstances, therefore *does* "place some"—indeed, significant—"limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 72.

where, as in *Faragher*, the harassing supervisor has primary day-to-day responsibility to direct and exercise supervision over the harassed employee or where, as here, the harassing supervisor invokes authority over work processes and personnel decisions to perpetrate an abusive workplace, there will be employer vicarious liability although, for purposes of determining whether there is actionable discrimination by the harassing supervisor, the case falls within the hostile environment proof pattern.

3. On the above analysis, the proper answer to the Question Presented by Petitioner in this case—"Whether a claim of *quid pro quo* harassment may be stated . . . where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions, or privileges of employment as a consequence of a refusal to submit to those advances" (Brief for Petitioner Burlington Industries, Inc., at (i))—is (1) "No", and (2) that this negative answer makes absolutely no difference to the outcome of this case, because (a) Ellerth has submitted facts sufficient to survive summary judgment using the hostile environment proof pattern (and might have done so, given the explicit threats, on a considerably lesser showing of repeated harassing behavior than shown here), and (b) the *quid pro quo*/hostile environment dichotomy does not determine the employer liability question.

In our view, there is nothing more this Court need decide fully to answer all issues fairly encompassed within the Question Presented here.

4. Given the foregoing analysis and the conclusions we draw, we would be derelict if we did not note that the *per curiam* opinion below, summarizing the ensuing separate opinions by various judges, indicates that our answer to the Question Presented *does* preclude Ellerth from going forward with this case, because she has waived her claim based on discriminatory working conditions caused

by supervisory sexual harassment. But it was, once again, the same assumption of a rigid, bifurcated legal world of sexual harassment litigation that led the *per curiam* opinion to state, erroneously, that Ellerth "expressly waived" her hostile environment claim in her briefs. Pet. App. 6a.

In fact, Ellerth explicitly relied upon and argued for affirmance of the District Court's ruling that the hostile environment—that is, discriminatory working conditions—claim could go forward. *See* Appellant's Reply Brief in the Court of Appeals, at 12 ("B. DEFENDANT IS LIABLE FOR HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT BY SLOWIK BECAUSE SLOWIK WAS AN AGENT OF DEFENDENT IN CREATING THIS ENVIRONMENT."); *id.*, n.3 (relying on the District Court's decision and her district court brief to show that "Ellerth . . . raised a genuine issue of material fact that the sexual harassment she was subjected to was severe or pervasive enough to create a hostile work environment.") And, on further inspection, the various *en banc* opinions issued by the Seventh Circuit reveal that the majority there actually concluded that Ellerth chose not to advance or rely on a negligence standard for employer liability (because she believed (as do we) that the proper employer liability standard for a discriminatory work environment case involving supervisory behavior of the kind in this case is based on the normal agency law principles governing the liability of employing entities for the acts of supervisors), *not* that Ellerth chose not to advance or rely on her discriminatory work environment claim. *See* Ellerth Ct. of App. Reply Br., 11; *see* Pet. App. 28a (Flaum, J.) (Ellerth "disavows any argument that liability should be imposed because of employer negligence"); *id.* at 59a ("Ellerth explicitly waived negligence as a ground for Burlington's liability"); *id.* at 206a-207a (Wood, J.) ("attempting to pigeonhole harassment cases" led to confusion about what Ellerth waived).

III. THE "COMPANY ACT" THEORY.

The parties and *amici* have treated this case as one raising the issue whether there can be employing entity vicarious liability in an inchoate threat situation such as this one, without regard to whether such a case is substantively measured by the same standard governing *quid pro quo* cases in which the threat is carried out or by a different standard.

In particular, Petitioner in large part embraces Judge Posner's proposal in his opinion on *en banc* consideration, that there can be no employer vicarious liability by reason of supervisor threats to take concrete adverse action in the form of firing the employee, denying her a promotion, etc., if she does not submit to sexual advances unless the threat is carried out. Under that "company act" proposal, if the plaintiff submits to the supervisor's sexual demands because of explicit threats to use his employer-conferred powers against her, or if the supervisor never carries out (although does not revoke) the threat, the plaintiff can only recover any damages from, or obtain any injunctive relief against, the employer by proving that the employer as an entity was negligent. Pet. App. 50a-55a. While we do not regard the propriety of that employer liability proposal as properly within the *substantive* categorization question on which *certiorari* was granted (particularly since the Petition for Writ of Certiorari did contain a second question, explicitly raising an employer liability issue, on which *certiorari* was not granted, *compare* Pet. at i (raising as a second question "Whether strict liability is the proper standard of liability under Title VII for *quid pro quo* sexual harassments") with 66 L.W. 3490 (limiting *certiorari* grant to the first question presented)), in this concluding section of our brief we nonetheless address the "company act" issue briefly.

Judge Posner proposes that for purposes of determining employing entity vicarious liability a distinction be drawn between situations in which a supervisor does carry

out a "company act" detrimental to an employee who spurned his sexual advances and situations in which the supervisor does not do so, whether because the employee capitulates to the demands, or because the employee brings suit on the threat before the supervisor has the opportunity to act on his threat, or because the supervisor was bluffing and did not in fact act on the threat when he had the opportunity to do so.

First, in making this proposal, Judge Posner essentially recognized—by providing an extended discourse on the irrelevance of established agency law to the present issue—that his proposed distinction does not comport with basic agency law principles. We have explained above in large part why that is so. As that explanation indicates, we agree with Judge Posner that rigid adherence to the minutia of *Restatement of Agency II* is not useful. In particular, the *Restatement II* is out of step with many of the most thoughtful modern agency cases on the question of whether personal-predilection-based, as compared to employer-business-needs based, discriminatory motivation takes a supervisor discriminatory act out of Title VII. And, in any event, that question must ultimately be answered—in our view in the negative—as a matter of Title VII employing entity liability law and not of pure *Restatement II* law.

At the same time, agency law, at least at its broadest, consensus level, is where *Meritor* directed the inquiry to begin. For Title VII does, as *Meritor* stressed, use the term "agent." And this Court's general rule, applied in *Meritor*, is that term used in statutes which have a traditional legal meaning are to be given that meaning, absent a good reason otherwise. *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1073 (1996); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992).

Equally to the point, established law does provide at least *some* useful, generally accepted content to the concept of agency for vicarious liability purposes—primarily, that whether an agent's actions are attributable to the

employer turns not on substantive law or on what realm of the employer's operations are involved but on whether the putative agent has employer-conferred authority which covers the area of operations within which the agent acts in violation of law. To draw a line between supervisor discrimination that works an actual economic loss on an employee—Judge Posner's so-called "company act" category, also known generally as the "*quid pro quo*" harassment category—and discrimination that involves supervisor discrimination that creates an actual abusive working environment therefore cuts into the problem in a substantive way that is entirely at odds with the basic precepts of agency law.

Second, in determining "as an original matter . . . what the best regime of libility would be" (Pet. App. 43a) for cases involving sexual harassment by supervisors, Judge Posner's departure point is that the *only* pertinent Title VII consideration is deterring sexual harassment in the workplace, and that providing compensation to the harassment victim for her injuries is not part of the Title VII regime. Pet. App. 44a.

Judge Posner's premise in this regard is squarely inconsistent with this Court's Title VII jurisprudence generally. *See McKennon v. Nashville Banner Publishing Co., supra*, 513 U.S. at 358 ("Deterrence is one object of [employment discrimination] statutes. Compensation for injuries caused by the prohibited discrimination is another."); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976) (making individual discriminatees whole for their the injuries caused by unlawful employment discrimination is "one of the central purposes" of Title VII); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.").

Indeed, Judge Posner's suggestion that Title VII is not concerned with providing compensation for the victims of sexual harassment because "sexual harassment does not

usually bring about a significant change in the victim's wealth" (Pet. App. 44a), flies in the face of the Civil Rights Act of 1991, which added compensatory damages to Title VII in large part to meet the concern that under the original statute victims of sexual harassment were not being fully compensated for their injuries. *See* Pub. L. 102-166 (Nov. 21, 1991) § 3 (the first of the three purposes of the Act is "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace"); H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 14 (1991) (a purpose of the Act is to "provide monetary remedies for victims of intentional discrimination"); *id.*, at 64-65 ("Monetary remedies are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity."). The examples contained in the Committee Reports, which focussed on sexual harassment, confirm that providing meaningful compensation to victims of sexual harassment was a major purpose of the 1991 Act. H.R. Rep. No. 102-40(I), *supra*, at 66-69 (Headed "Making Victims of Intentional Discrimination Whole for Injury to Their Careers, Mental and Emotional Health, and Self-respect and Dignity" and containing excerpts from testimony by several victims of sexual harassment concerning the impact of the harassment on them and the inadequacy of the then-extant Title VII remedies in making them whole for their injuries).[12]

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[12] Because Congress plainly *intended* to provide compensation for mental and emotional injuries, we are not sure of the pertinence of Judge Posner's posit that "an award of damages in these case is not *primarily* designed to protect the victim's standard of living." Pet. App. 44a. We note, nonetheless, that the compensatory damages remedy added to Title VII in 1991 was meant to cover nonbackpay economic costs, such as medical expenses (H.R. Rep. No. 102-40(I), *supra*, at 66-67), and that Congress also recognized that the "terrible humiliation, pain and suffering, psychological harm and related medical problems" was likely to cause "other economic losses," including inability to work (*id.*).

The fact that compensation for the victims of unlawful sexual harassment *is* central to the Title VII scheme puts the question of employer liability in a very different posture than if Title VII's focus were purely on deterrence. Judge Henry Friendly, in an agency law case decided long before sexual harassment generated a cause of action, explained why:

> It is not at all clear . . . that expansion of liability [to situations in which the employee was acting in connection with his employment but forwarding his own rather than his employer's purposes] . . . will lead to a more efficient allocation of resources. . . . [since] a more efficient allocation can only be expected if there is some reason to believe that imposing a particular cost on the enterprise will lead it to consider whether steps would be taken to prevent a recurrence of the accident. . . . [And, while it] is true, of course, that in many cases the plaintiff will not be in a position to insure, and so expansion of liability will, at the very least, serve respondeat superior's loss spreading function. . . . the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility. . . .
>
> [An efficiency] policy analysis thus is not sufficient to justify this proposed expansion of vicarious liability. This is not surprising since respondeat superior . . . rests not so much on policy grounds . . . as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities. [*Ira S. Bushey & Sons v. United States*, 398 F.2d 167, 171 (2nd Cir. 1968).

And, since " 'men [and women] do not discard their personal qualities when they go to work' " (*id.*, *quoting Hartford Accident & Indemnity Co. v. Cardillo*, 112 F.2d 11, 15 (2nd Cir.), *cert. denied*, 310 U.S. 649 (1940)), employers who invest supervisors with authority over employees in their working lives cannot absolve themselves from responsibility when, in the course of exercising that authority, the supervisor injures the employee in the manner that the Title VII ban on discriminatorily abusive working conditions is intended to prevent.

Third, even if one focusses on the deterrence rather than the compensation goal of Title VII, Judge Posner's insistence that employers should be liable only for their "own" negligence where there has been no "company act" is difficult, if not impossible to justify, for two reasons:

In the first place, Judge Posner's "company acts"/discriminatory working conditions" distinction rests on his perception that employer monitoring of the former, but not the latter, is feasible. But, as discussed above a "company act" sexual harassment case is simply one variety of an "individual disparate treatment" challenge to an employment decision, of the kind underlying the *McDonnell Douglas* line of cases. And, the last of those cases, *St. Mary's Honor Center v. Hicks*, termed "highly fanciful" the notion that an employing entity can sufficiently monitor all decisions by supervisors with authority to make personnel decisions so as to be aware of their mental reasons for making decisions as they did. 509 U.S. at 514 & n.5.[13] Precisely because that is so, and contrary to Judge Posner, the discriminatory working conditions that make a hostile environment are, if anything, *more* likely to be visible in the workplace and knowable by more senior employer supervisors and managers than the mental processes of employer decisionmakers regarding personnel decisions.

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[13] It is worth noting that *St. Mary's* takes it as a given that the employing entity *would* be liable for the discriminatory motives of its "hiring officer," without more, if those motives were adequately proven. 509 U.S. at 513-14. There was no suggestion that this liability could have been avoided by clear directions to that officer to make decisions on the merits rather than on racial grounds, or by proving that the "hiring agent" was an out-and-out racist and discriminated because he, personally, was unwilling to work with African Americans even if they were the best employees available for the employer's purposes.

Additionally, and critically, Judge Posner's "negligence" standard of employer liability in discriminatory working conditions cases is more, not less, likely to lead to protracted litigation and free-floating judge and jury decision-making than the normal "scope of authority" vicarious liabiilty agency standard.

Title VII, of course, does not contain any reference to a negligence standard; rather, the statute on its face forbids employers to "discriminate," (42 U.S.C. § 2000e-2(a)(1)), a term that usually bespeaks intentional acts. *See also* 42 U.S.C. § 2000e-5(g) (providing relief under Title VII for intentional unlawful employment practices). And Title VII certainly does not lay out the factors to be taken into account to determine whether an employer has been negligent with respect to supervisor discriminatory conduct.

Thus, as Judge Posner acknowledges, to apply his negligence standard the courts will have to develop their own standards regarding what a reasonable employer would do to prevent supervisor discrimination. Pet. App. 50a. Such standards will have to set prescriptions for employer harassment policies, including such matters as whether the protections accorded from retaliation are meaningful, whether the dissemination of the policy to employees and supervisors was adequate, and whether in practice the policy provides prompt and adequate relief.[14]

[14] As we noted in our *Faragher Amicus* Brief (at p. 23, n.8), under a vicarious liability standard the existence of an effective employer policy forbidding sexual harassment by supervisors and providing employees with a means of complaining to hiring authorities about such harassment can in many circumstances protect employees from liability for harassment. As we noted there an effective harassment policy provides an employer with possibility of remedying harassment before it becomes actionable, is relevant in assessing constructive discharge claims, may decrease compensatory damages on a "mitigation" theory, and would be relevant to punitive damages.

Additionally, that an employee does not take advantage of a widely-disseminated, effective policy but complains only after the

Additionally, since, as Judge Posner recognizes, employers can be negligent by failing to act on actual or constructive knowledge of harassment (Pet. App. 45a), courts will have to develop and apply standards elucidating the level of authority within a company that actual knowledge must reach in order to trigger a responsibility to act. *See Young v. Bayer Corp.*, 123 F.3d 672 (7th Cir. 1997), a companion case to *Ellerth*, that undertakes precisely that inquiry recognizing that it is necessitated by the Seventh Circuit's negligence standard for hostile environment cases generally.

Finally, with regard to "constructive knowledge" in this context it is plain from the lower court cases that the determination that an employer "should know" of pervasive harassment is a normative, not cognative, determination. And, for many business reasons, employers may choose to maintain decentralized management systems, in which headquarters personnel do not involve themselves in the day-to-day affairs of geographically or functionally distinct branch offices or departments (such as those involved in *Meritor* or *Faragher*). For judges and juries to decide that the employer "should have" known what was happening on a day-to-day basis in such departments or

fact would certainly be relevant as a credibility matter in determining whether the harassing incidents ever occurred.

Further, where harassment is by co-employees rather than supervisors, an employer cannot be vicariously liable because the areas of employment decisions and establishing and monitoring of working conditions are not within the co-employees scope of employment. At the same time, an employer who provided no means of remedying pervasive or severe harassment by such employees may be held to have established discriminatory working conditions. That being so, employers are likely to maintain poliices discouraging harassment, and are unlikely to except harassment by supervisors from such policies.

For all these reasons, the notion that a vicarious liability standard for supervisory working condition harassment will lead to less rather than more effective employer policies against harassment is an empty one.

offices is necessarily to involve judges and juries in corporate structural matters that are more usually addressed in corporate board rooms and schools of business administration.

In short, along with its other defects, a negligence standard for supervisor sexual harassment, whether that harassment takes the form of a "company act" or not, cuts against the general principle that Title VII preserves employer autonomy with regard to carrying out its obligations under the statute because "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated by Congress they should not attempt it." *Furnco Construction Co. v. Waters, supra*, 438 U.S. at 578.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Seventh Circuit, en banc, should be affirmed.

Respectfully submitted,

JONATHAN P. HIATT
815 - 16th Street, NW
Washington, DC 20006

MARSHA S. BERZON
177 Post Street
Suite 300
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, DC 20036
(202) 833-9340

* Counsel of Record